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NO. 82-195

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

VAN D. MUELLER, ET AL.,
Petitioners,

v.

CLYDE E. ALLEN, JR., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA")

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The National Jewish Commission on Law and Public Affairs ("COLPA") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of respondents that the decision below should be affirmed.

Consent to file this brief has been sought from the parties, but counsel for respondents have refused to consent on the ground that it is their policy not to consent to the filing of *amicus* briefs in this case, whether

they be favorable to or contrary to their position. It is therefore necessary to request leave of Court to file the attached brief, pursuant to Rule 42.

COLPA is a voluntary, not-for-profit corporation of attorneys and social scientists of the Jewish faith, dedicated to combatting all forms of religious prejudice and discrimination and representing the position of the Orthodox Jewish community in matters of public affairs. Since its organization in 1966, COLPA has filed *amicus* briefs before this Court in numerous cases involving the Free Exercise and Establishment Clauses of the First Amendment. *See, e.g., Widmar v. Vincent*, 102 S.Ct. 269 (1981); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Commission*, 397 U.S. 664 (1970).

This case is of substantial importance to COLPA and the organizations joining with it in this brief because of their recognition of the importance of a healthy educational system to the welfare of a free society, and their firm belief in the importance of the advancement of educational opportunity for all American school children. We believe that our pluralistic society benefits through legislation designed to grant a small measure of tax relief to those parents of both private and public school children who bear the burden of tuition for their children's education.

COLPA believes that the accompanying brief will be of assistance to the Court because it will give this Court the benefit of COLPA's views based on its extensive experience in the area of the First Amendment.

Respectfully submitted,

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BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

This brief is being submitted by the National Jewish Commission on Law and Public Affairs ("COLPA") on behalf of itself and the following major

national Orthodox Jewish rabbinic, synagogal, educational and social service agencies which represent the broad spectrum of the Orthodox Jewish community in this country:

Agudath Israel of America
National Council of Young Israel
Rabbinical Alliance of America
Rabbinical Council of America
Torah Umesorah, The National Society for Hebrew Day Schools
Union of Orthodox Jewish Congregations of America
Union of Orthodox Rabbis of the United States and Canada

In addition, COLPA files this brief on behalf of the Board of Jewish Education of Greater New York, the educational service agency of the Federation of Jewish Philanthropies of New York.

COLPA is a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. COLPA and the organizations joining with it in this brief are deeply committed to the preservation of constitutional rights for all Americans, and in particular to the principles of the First Amendment, in the belief that thereby Americans of the Jewish faith, in common with all Americans, will enjoy the blessings of liberty.

The primary and secondary education of our children is a subject of the highest importance to the Orthodox Jewish Community, which is committed to provide for its children the very finest training in both secular and religious fields. Although the Constitution commits the financing of religious education to private support, we believe it to be a proper and

legitimate—indeed, a necessary—function of government to assist *all* citizens of *all* faiths in providing a high-quality secular education for the youth of America. By granting itemized-deduction status in an income-tax structure to a family's expenditures for such education, a State is only recognizing that tuition expenditures serve public policies which are as important as the payment of interest on home mortgages, the payment of medical and hospital expenses, and the payment of contributions to local welfare agencies or churches. It is, we believe, an essential part of the cooperation between government and the private sector to permit itemized deductions to be utilized for the achievement of socially useful objectives such as the education of elementary and secondary-school children. It is unsound constitutional law and policy to invalidate a law that improves the quality of primary and secondary education merely because litigants believe that the statutory mechanism may produce some imprecisely quantifiable financial benefit to the parent of a child attending a sectarian school. The First Amendment is not a directive to search out miniscule flaws in an otherwise sound legislative policy.

ARGUMENT

Minnesota's income-tax structure follows the familiar federal tax model. Minnesota requires taxpayers to report their annual gross incomes and then permits them to deduct items of expense that are recognized by Minnesota law as legitimate offsets against annual income. This produces a taxable income figure. On this basis, Minnesota's income-tax law—like its federal counterpart—permits a taxpayer to deduct interest payments (which frequently make up a substantial part of the mortgage payments for a

taxpayer's personal residence), medical expenses, and charitable contributions. *See* Minn. Stat. Ann. §§ 290.09(3), 290.09(10), 290.21(3). Minnesota also provides itemized deductions for income-tax purposes that are not authorized by federal law, such as payments to cooperative apartment corporations (Minn. Stat. Ann. §290.09(17)), expenses incurred in establishing, maintaining or increasing the circulation of a newspaper or magazine (*id.* §290.09(16)), and expenses incurred in the adoption of one or more children (*id.* §290.09(27)). The issue in this case is whether tuition or other specified education-related payments to a primary or secondary school may constitutionally be given the same status as interest payments, medical expenses, charitable contributions, or other itemized deductions in Minnesota's income-tax scheme.

A single constitutional proposition is, we believe, dispositive of this case: A law which permits taxpayers to deduct private payments to a nondiscriminatorily defined category of recipients as one of a number of itemized deductions for income-tax purposes is too indirect and uncertain a form of assistance to religion to be barred by the Establishment Clause of the First Amendment. This constitutional proposition is supported by decades of common understanding in this country, during which taxpayers and the Congress have consistently assumed that there is no constitutional infirmity in a law that permits private contributions to indisputably religious bodies such as churches to be treated as tax deductions. Direct private aid to churches has been encouraged by the availability of such tax deductions, but no court has ever declared such indirect and imprecisely quantifiable aid to be unconstitutional.

The petitioners' brief, as well as briefs of various

amici supporting the petitioners' position, have tried to portray this case as if it were controlled by this Court's decisions in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter*, 433 U.S. 229 (1977). In fact, this is not a case in which funds are spent from the public treasury for the benefit of private schools, including many which offer sectarian education. It is, rather, a case involving itemized tax deductions, a form of public recognition of the private allocation of resources which has traditionally been accepted in our society, even where the direct and immediate beneficiary is an institution that is totally religious in nature.

This Court repudiated in *Nyquist* the position underlying petitioners' challenge to the Minnesota tax deduction statute when it held (413 U.S. at 790 n. 49) that the program in that case did not involve "a genuine tax deduction, such as for charitable contributions." In so doing, the Court recognized that not all "tax benefits" are constitutionally identical. There are significantly different social policies and consequences to each of various forms of "tax benefits" that a legislature might devise.

Itemized deductions for charitable contributions have been a part of our federal tax structure for many years. On account of this provision, individuals donate significant amounts to churches, synagogues and other religious institutions. The universal acceptance of this form of "tax benefit" to religion is itself cogent proof of its constitutionality. *See, e.g., Walz v. Tax Commission*, 397 U.S. 664, 675-80 (1970).

If contributions made directly to churches, synagogues or sectarian schools to advance their *religious* activities may be deducted from a taxpayer's gross income in computing his tax without violating

the Establishment Clause, it follows *a fortiori* that individual payments to a sectarian school for the cost of a *secular* education, for *secular* textbooks or for student transportation may surely be deducted, in similar fashion, without running afoul of the Establishment Clause. Each may be a form of public recognition of private financial assistance, but it is surely indisputable that a tax deduction for a contribution to a church aids religion far more immediately and directly than a deduction for a payment for secular services provided to a student in a sectarian school. The fact that the first taxpayer is giving a gift to the church or to the sectarian school while the second is purchasing a service from such an institution surely does not affect the First Amendment issue. Indeed, legislative encouragement of a gift is more of an aid to religion than legislative encouragement of the purchase of services. In the former instance, the religious institution may use the gift to proselytize others; in the latter, it merely provides a benefit to one who is already an adherent.

To be sure, there may be rational legislative reasons to permit a tax deduction for a gift which may not apply to the purchase of a service. But that legislative question—which the Minnesota legislature has resolved in favor of recognizing the deductibility of both expenditures—is not a First Amendment question. It raises neutral issues of fiscal policy. And just as the Minnesota legislature could and did decide that amounts spent in purchasing services needed to augment the circulation of a magazine or to adopt a child may be deducted, it could legitimately conclude that the purchase of services for elementary or secondary education—whether at sectarian or non-sectarian schools—may be encouraged with the recognition of a tax deduction.

Petitioners seek to distinguish charitable contributions deductible under Section 170 of the Internal Revenue Code from the deductions in this case on the ground that only expenditures made "out of 'detached and disinterested generosity' " are given deductible status by Section 170. *See* Brief for Petitioners at 21-25. That characterization is simply wrong. Deductions under Section 170 of the Internal Revenue Code for payments made to secular or to religious institutions have consistently been permitted even where the group of which the contributor is a member receives some substantial benefit from the charity he has given. "Detached and disinterested generosity" is not a prerequisite for a constitutional itemized tax deduction.

In Rev. Rul. 80-77, 1980-1 C.B. 56, for example, the Internal Revenue Service held that contributions (1) to a Red Cross chapter which provided food and temporary shelter to a taxpayer during a tornado, (2) to a local volunteer fire department which is a town's only firefighting agency, (3) to a local Girl Scout unit to which a daughter of the taxpayer belongs, and (4) to a charitable campaign which supports a home for the elderly where the taxpaver's parent resides are all permissible charitable deductions. *See also Wegner v. Lethert,* 67-1 U.S.T.C. ¶ 9229 (D. Minn. 1967) (contribution to Catholic Welfare Association which provided assistance to taxpayer in adopting a child); *Isabel Peters,* 21 T.C. 55 (1953) (contribution to swimming facilities for local residents). By the same token, contributions by members of a local bar association to the maintenance of a law library accessible only to bar association members and their designees is a permissible charitable contribution, even though the contributors—who appear to be the exclusive beneficiaries of the library's facilities—are not acting

out of "detached and disinterested generosity." Rev. Rul. 75-196, 1975-1 C.B. 155. *See also* Rev. Rul. 79-323, 1979-2 C.B. 106 (contribution to industrial commission in a particular area); Rev. Rul. 76-419, 1976-2 C.B. 146 (contribution for industrial parks); Rev. Rul. 71-545, 1971-2 C.B. 235 (contribution for international exposition); Rev. Rul. 70-186, 1970-1 C.B. 128 (contribution for preservation of local lake).

There are ample precedents along the same lines for contributions to organizations dedicated to religious purposes. Rev. Rul. 77-430, 1977-2 C.B. 194, concerned the eligibility for charitable contributions of a non-profit organization conducting weekend religious retreats for Christian denominations at a lakeshore site. Although no fees were charged for use of the facilities, participants were urged to contribute. The Internal Revenue Service concluded that since the facilities are used for religious purposes, contributions from retreat participants are deductible—although it seems clear that their motivations are not entirely "detached and disinterested." Similarly, a nonprofit organization that publishes a monthly church newspaper and carries notices and items of interest to church members qualifies for deductible charitable contributions, even though its contributors may benefit substantially from the publication. Rev. Rul. 68-306, 1968-1 C.B. 257. *See also* Rev. Rul. 71-580, 1971-2 C.B. 235 (nonprofit religious genealogical organization). Indeed, the Internal Revenue Service has recognized that even if a contribution to a church is in direct proportion to the benefits received by the taxpayer from the church—*i.e.*, "pew rents, building fund assessments, and periodic dues"—they are permissible itemized deductions. Rev. Rul. 70-47, 1970-1 C.B. 49.

Tuition payments to churches or church schools are, to be sure, not deductible under Section 170. But that is not because they violate the Establishment Clause more than "pew rents" or "periodic dues." The *only* reason why payments to a church for religious instruction are not deductible under Section 170 is that the United States Congress has made a legislative judgment that when an individual or his family receives a direct personal benefit in exchange for the funds he provides, his payment is not a "contribution" within the meaning of Section 170. That same principle—which is totally devoid of any First Amendment significance—applies to wholly nonsectarian groups such as the Girl Scouts or a volunteer fire department. A payment to either organization is a tax-deductible "contribution" if there is no personal *quid pro quo*, so that any private benefit that may result is regarded as merely incidental to the general public benefit that is served, but it is not a "contribution" if the giver receives a particularized secular service or a tangible product in exchange for his payment.

In this case, the Minnesota legislature has departed from the federal model to provide a tax deduction for tuition for elementary and secondary education—as it has done for payments made in the course of an adoption. That legislative judgment raises no First Amendment question. So long as no direct governmental revenue allocation is involved and the only form of tax benefit is an itemized deduction on an income-tax return, the legislature's decision passes constitutional muster.

We recognize, of course, that the distinction between tax deductions and governmental expenditures "has encountered stormy weather in academic circles in recent years." Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 Tax L.

Rev. 37 (1972), and authorities cited in n. 1. As a matter of academic logic, there may be little economic difference between an expenditure from the public treasury and the allowance of a tax deduction. But when viewed from the vantage point of the First Amendment, which is designed to prevent the power, prestige, and financial support of government from being exploited on behalf of one religion or all religions (*Engel v. Vitale,* 370 U.S. 421, 431 (1962)), there is an obvious difference between a payment from the public treasury and allowance of a tax deduction.

By allowing a tax deduction, the State is not endorsing what the private giver has done. It is merely acknowledging private philanthropy—or some other private expenditure of funds—as a beneficial and socially useful means of allocating private resources. The payment is a private one, and neither the recipient nor any onlooker may view it, at the time it is made, as bearing any State imprimatur. Nor is the precise amount of its ultimate financial value definitely ascertainable. As of the time the payment is made, its consequences may depend on many other factors that may not be known until the end of the year. The taxpayer's "tax bracket," as well as other facts that might bear on the utility of the deduction (such as whether the taxpayer will have net income in that year), may depend on future events. Thus, the ultimate impact of the private payment upon the public treasury is not ascertainable if it is only classed as a permissible itemized deduction.

For these reasons, there is a basic constitutional difference between payments from a public treasury and itemized deductions in an income tax structure. This case involves the latter, which are well-established permissible tax benefits to religious institutions.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals sustaining the challenged Minnesota law should be affirmed.

Respectfully submitted,

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